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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

Michael L. Bernback,

Petitioner,

v.

Thomas Greco, Individually and as President of Harvey's Lake Amphitheater, Inc.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 1961, does interest on an award of attorney's fees run from the entry of the judgment establishing the *right* to fees (as the Fifth, Sixth, Eighth, Ninth, Eleventh, and Federal Circuits hold) or instead the entry of a later order fixing the *amount* of fees (as the Third, Seventh, and Tenth Circuits hold)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael L. Bernback respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions of the Third Circuit (Pet. App. 1a-2a) and district court (*id.* 3a-5a) are unpublished. The court of appeals issued its opinion on March 30, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. 1961(a) provides in relevant part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of the entry of the judgment * * *."

STATEMENT

1. On November 6, 2000, the U.S. District Court for the Middle District of Pennsylvania entered judgment in the amount of $225,000 on a jury verdict for petitioner in a breach of contract action against respondent. See *Bernback* v. *Greco*, No. 02-2742, 69 Fed. Appx. 98, 101 (CA3 July 11, 2003), cert. denied, 540 U.S. 1185 (2004). Under the terms of the contract, this judgment also entitled petitioner – as the "prevailing party" – to recover attorney's fees and costs. See 69 Fed. Appx. at 105.

Approximately twenty months later, on July 29, 2002, the district court entered an order fixing the amount of costs and fees at $162,748.62. See 69 Fed. Appx. at 101.[1]

2. When the parties could not agree upon the amount of interest due on the fee award, petitioner timely moved in the district court for an award of interest. Petitioner sought interest under 28 U.S.C. 1961 running from the November 6,

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[1] On appeal, the Third Circuit affirmed. 69 Fed. Appx. at 105.

2000 entry of the judgment on the jury verdict. Pet. App. 1a-2a. Calculated from that date, petitioner would receive $85,917.44 in interest.

Respondent, by contrast, argued that interest did not begin to accrue until the award of attorney's fees was quantified in the district court's July 29, 2002 order. Calculated from that date, petitioner would receive $30,981.66 less, or $54,935.78. Pet. App. 1a-2a.

The district court agreed with respondent. It held that the question was governed by the Third Circuit's rule that "post judgment interest on an attorney's fee award runs from the date the award is quantified." Pet. App. 4a (quoting *Eaves* v. *County of Cape May*, 239 F.3d 527 (2001)).

3. Petitioner appealed to the Third Circuit, which affirmed. The court acknowledged that petitioner's position was supported by "precedent from other courts of appeal," but agreed with the district court that the "result [was] controlled by" its prior precedent holding that interest runs from the entry of the order quantifying the award of attorney's fees. Pet. App. 2a.

4. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of a frequently recurring circuit conflict openly acknowledged by the courts of appeals. The question turns on the proper construction of 28 U.S.C. 1961, which provides that interest "shall be allowed on any money judgment." The courts of appeals uniformly agree that an award of attorney's fees qualifies as a judgment for purposes of Section 1961. See, *e.g.*, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 250 F.3d 482, 484-85 (CA6 2001); *Eaves*, 239 F.3d at 530.

Only the Seventh and Tenth Circuits agree with the Third Circuit's holding that, under Section 1961, interest on an award of attorney's fees and costs does not begin to accrue until the district court enters an order quantifying the fee award. *Eaves*, 239 F.3d at 528; *MidAmerica Federal Savings*

& Loan Association v. *Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (CA10 1992); *Fleming* v. *County of Kane*, 898 F.2d 553, 565 (CA7 1990).

The Fifth, Sixth, Eighth, Ninth, Eleventh, and Federal Circuits disagree, holding that interest begins to accrue with the original judgment entitling a party to recover fees and costs. *Drabik*, 250 F.3d at 495; *Friend* v. *Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995), cert. denied, 516 U.S. 1146 (1996); *BankAtlantic* v. *Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1052-53 (CA11 1994); *Jenkins* v. *Missouri*, 931 F.2d 1273, 1277 (CA8 1991); *Mathis* v. *Spears*, 857 F.2d 749, 760 (CAFC 1988); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544-45 (CA5 1983) (en banc), overruled on other grounds by *International Woodworkers of America* v. *Champion International Corp.*, 790 F.2d 1174, 1175-76 (CA5 1986) (en banc).[2]

2. This Court's intervention is required because the circuit conflict is both longstanding and intractable. The split has existed since 1990 (see *Fleming*, 898 F.2d at 565) and is only growing more entrenched with time. In 2001, for example, the Third and Sixth Circuits addressed the issue for the first time. Although both courts acknowledged the division among the circuits and analyzed the question presented at some length, they reached opposite conclusions. In adopting the minority rule, the Third Circuit noted that

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[2] The Second Circuit has also indicated its agreement with the majority position. See *Estate of Calloway ex rel. LMN Products* v. *Marvel Entertainment Group*, 9 F.3d 237, 241-42 (1993) (citing *Mathis* for the proposition that interest on an attorney sanction award "runs from the date of the judgment authorizing the right to the award, not from the date of a later judgment establishing its exact amount"). See also, *e.g.*, *Foley* v. *City of Lowell*, 948 F.2d 10, 22 n.16 (CA1 1991) (acknowledging the split and reserving the issue); *King* v. *JCS Enterprises, Inc.*, 325 F. Supp. 2d 162, 174-75 (E.D.N.Y. 2004) (acknowledging the split and adopting the majority rule).

"there is no consensus among the Courts of Appeals" but explained that "[w]e do not find the reasoning of the courts adopting the 'majority view' persuasive." *Eaves*, 239 F.3d at 531-32; see also *MidAmerica*, 962 F.2d at 1476 ("We are fully aware that our holding contradicts the language of [the Fifth Circuit in] *Copper Liquor, Inc.* * * *."). On the other side of the split, the Sixth Circuit "respectfully decline[d] to accept the Third and Tenth Circuits'" interpretation of the phrase "money judgment" in 28 U.S.C. 1961. *Drabik*, 250 F.3d at 489; see also *Louisiana Power & Light Co.* v. *Kellstrom*, 50 F.3d 319, 332 (CA5 1995) ("Since *Kaiser*, three Circuits have addressed this issue. The Seventh and Tenth Circuits held that *Kaiser* does supersede *Copper Liquor*. The Eighth Circuit disagreed * * *. We agree with the Eighth Circuit."), cert. denied, 516 U.S. 862 (1996); *Jenkins*, 931 F.2d at 1275 ("The [Seventh Circuit's] *Fleming* result runs counter to the holdings of the Fifth Circuit in *Copper Liquor* and the Federal Circuit in *Mathis*." (citations omitted)).

That only this Court can bring uniformity to federal law is further demonstrated by the fact that several circuits have declined opportunities to resolve the issue en banc. See, *e.g.*, *Friend*, 72 F.3d at 1387 (amended opinion indicating denial of rehearing en banc); *Fox Industries, Inc.* v. *Structural Preservation Systems, Inc.*, 922 F.2d 801 (CAFC 1990), reh'g denied, 1991 U.S. App. LEXIS 397 (Jan. 14, 1991). Moreover, at least two circuits regard their prior holdings on the question presented as settled law and in subsequent cases have thus merely adhered to those prior holdings without further elaboration. See, *e.g.*, *Fox Industries*, 922 F.2d at 804 (addressing the issue by simply asserting that the district court "correctly calculated post-judgment interest from the date of the judgment establishing the right to the award" and citing *Mathis*, 857 F.2d at 760); Pet. App. 2a (Third Circuit holding only that "*Eaves* binds us").

This Court's intervention is required for the further reason that the conflict is rooted in a disagreement among the

circuits over the meaning of this Court's decision in *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827 (1990). Only this Court can resolve the uncertainty. In *Kaiser*, this Court relied on the plain text of the statute – which refers to the "date of judgment" – to hold that an award of post-judgment interest pursuant to 28 U.S.C. 1961 "properly runs from the date of the entry of judgment" rather than the date of the underlying jury verdict. *Id.* at 836. This Court further held that interest may not be calculated from the date of a judgment that is later found to be unsupported by the evidence, explaining that when "the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Ibid.* The Third and Tenth Circuits have concluded that *Kaiser* mandates the minority rule. See *Eaves*, 239 F.3d at 539 ("[W]e view [*Kaiser*] as dictating our result."); *MidAmerica*, 962 F.2d at 1475 ("[W]e see no way to square MidAmerica's request for interest on an unliquidated attorneys' fees award with *Kaiser*."). These courts argue that attorney's fees are not "'ascertained' in any meaningful way" until they are quantified. See *Eaves*, 239 F.3d at 537-38; *MidAmerica*, 962 F.2d at 1476. By contrast, the Fifth, Sixth, Eighth, and Eleventh Circuits have explicitly held that *Kaiser* is consistent with or supports the majority position. See *Drabik*, 250 F.3d at 492 ("[A]n award of interest on attorney fees running from the date of the judgment entitling the prevailing party to such fees, albeit unquantified, is consistent with the requirements of [*Kaiser*]."); *Kellstrom*, 50 F.3d at 332 ("We therefore hold that *Kaiser* did not overrule *Copper Liquor*, so that the district court here did not err in awarding postjudgment interest from the date of the judgment on the merits."); *BankAtlantic*, 12 F.3d at 1273 (citing *Kaiser*); *Jenkins*, 931 F.2d at 1276 n.3 ("We * * * conclude that * * * [*Kaiser*] do[es] not address the issue before us.").

3. Certiorari is also warranted because the question presented is important and frequently recurs. Section 1961 governs "*any* money judgment in a civil case recovered in a

district court" (emphasis added). Awards of attorney's fees routinely implicate the question presented because there is very often a delay between a judgment on the merits entitling a party to attorney's fees and the later judgment quantifying those fees and costs. Attorney's fees typically continue to accrue until the very point that the judgment on the merits is entered and are, for that reason, frequently not quantified until later. Civil litigation thus often produces "two distinct judgments": "the 'merits judgment,' which grants the prevailing party the right to recover attorney's fees and the 'exact quantum judgment,' which defines the precise amount of the fee award." *McDonough* v. *City of Quincy*, 353 F. Supp. 2d 179, 192 (D. Mass. 2005). Indeed, the issue arises so frequently that *nine* circuits have decided the question presented.

In those circuits in which the issue has not yet been settled, it is frequently litigated in the district courts. See, *e.g.*, *Aiello* v. *Town of Brookhaven*, No. 94-CV-2622, 2005 U.S. Dist. LEXIS 11462, at *31 (E.D.N.Y. June 13, 2005); *Petrovits* v. *N.Y. City Transit Auth.*, No. 95 Civ. 9872, 2004 U.S. Dist. LEXIS 174, at *19 (S.D.N.Y. Jan. 7, 2004); *King*, 325 F. Supp. 2d at 174-75; *Mogilevsky* v. *Bally Total Fitness Corp.*, 311 F. Supp. 2d 212, 225-26 (D. Mass. 2004); *Tenax Corp.* v. *Tensar Corp.*, Civ. No. H-89-424, 1992 U.S. Dist. LEXIS 21620, at *20 (D. Md. Oct. 22, 1992); *Burston* v. *Virginia*, 595 F. Supp. 644, 652 (E.D. Va. 1984). These opinions of course represent only a small fraction of the total number of cases applying one of the conflicting interpretations of Section 1961. Most of the circuit court cases addressing the issue are appeals from district court opinions that are not published in any form. Moreover, in those circuits in which the issue is well-settled there is little chance of the issue being raised on appeal.

The issue is furthermore important because the circuits' conflicting interpretations regularly produce markedly inconsistent results. This case is a perfect illustration: had the case been brought in a circuit applying the majority rule,

petitioner would have received an additional $30,000 in interest. In other cases, the financial consequences of the rule have been even greater. In *MidAmerica*, calculations reveal that the Tenth Circuit's application of the minority rule reduced the plaintiff's recovery by more than $180,000. See 962 F.2d at 1475.[3]

4. This case presents an especially suitable vehicle to resolve the question presented because it is the only issue addressed in the decision below. In contrast to many of the other cases addressing this question, see, *e.g.*, *Friend*, 72 F.3d at 1389; *MidAmerica*, 962 F.2d at 1472, the parties do not dispute that petitioner is entitled to recover attorney's fees or the district court's determination of the amount owed.[4]

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[3] The importance of the question presented extends beyond the amount of interest due on attorney's fees awards. Courts have extended their construction of Section 1961 to govern the interest due on awards of costs as well. See *Wheeler* v. *John Deere Co.*, 986 F.2d 413, 415 (CA10 1993).

[4] The Third Circuit correctly rejected respondent's argument that petitioner is not entitled to interest accruing from the November 6, 2000 order even under the majority rule. Respondent's theory was that the judgment did not mention attorney's fees. See Resp. C.A. Br. 8, *Bernback* v. *Greco*, No. 04-2494, 127 Fed. Appx. 45 (Mar. 7, 2005). But as the Third Circuit recognized, the November 6, 2000 judgment was a "judgment on a jury verdict entitling a party to attorneys fee and expenses." Pet. App. 2a. Moreover, under the majority rule, interest begins to accrue with a judgment that "unconditionally entitle[s]" a party to recover fees, even if that judgment does not explicitly refer to attorney's fees. *Drabik*, 250 F.3d at 495. The November 6, 2000 judgment for petitioner on his breach of contract claim "unconditionally entitled" him to recover attorney's fees under the terms of the contract, which provided that the "prevailing party" "shall be entitled to recover from the other party actual attorney's fees incurred, court costs, and all other litigation-related expenses." *Bernback*, 69 Fed. Appx. at 101. And although respondent contended below – and presumably would argue on remand from a

5. Certiorari furthermore is warranted because the minority rule applied by the Third Circuit in this case is wrong on the merits. The text and purpose of 28 U.S.C. 1961 both support the majority rule. Moreover, this Court's interpretation of Section 1961 – far from "dictating" the Third Circuit's rule – is most consistent with the majority approach.

First, the Third Circuit's rule is inconsistent with Congress's determination in Section 1961 to award interest on "any money judgment * * * calculated from the date of the entry of the judgment." Courts applying the minority rule erroneously construe a judgment entitling a party to attorney's fees but not quantifying those fees not to be a "money judgment." The better view recognizes that a district court may enter a qualifying "money judgment" without specifying the particular amount due. Through the term "money judgment," Congress did not require a precise calculation but instead simply intended to contrast forms of judgments that do not give rise to a right to monetary relief. This usage is consistent with the common legal meaning of money judgment: "A judgment for damages subject to immediate execution, *as distinguished from* equitable or injunctive relief." BLACK'S LAW DICTIONARY 848 (7th ed. 1999) (emphasis added). An award giving rise to a right to fees thus triggers the right to interest "because it involves a judgment for money, i.e., attorney's fees, distinguishable from other types of judgments, such as judgments for equitable or injunctive relief." Nick J. Kemphaus & Richard A. Bales,

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decision of this Court – that the November 6, 2000 judgment did not "unconditionally entitle" petitioner to recover attorney's fees (because respondent denied that petitioner was in fact the "prevailing party"), under the majority rule a dispute over whether a party in fact "prevailed" does not preclude that party from recovering interest from the date of a merits judgment even if that judgment does not mention fees. See *Friend*, 72 F.3d at 1388. In any event, respondent's contention is at most an issue to be determined on remand.

Interest Accrual on Attorney's Fee Awards, 23 REV. LITIG. 115, 130 (2004).[5]

Second, the Third Circuit's rule is contrary to the purpose of Section 1961. Congress mandated the payment of interest on judgments to "compensate the plaintiff or to avoid unjust enrichment of the defendant." S. Rep. No. 97-275, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 11.[6] Both goals are frustrated by the Third Circuit's rule deferring the accrual of interest. Interest should be paid between the date on which the right to fees arises and the later date the precise amount is calculated because the paying party has "the use of the money in the interim and because the statutory interest rate is tied to the U.S. Treasury Bill rate" and therefore accurately reflects the value of the right to use the funds during that time. *Jenkins*, 931 F.2d at 1277. See also Kemphaus & Bales, *supra*, at 133 ("[B]ecause the losing party maintains

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[5] To reach the contrary result and require that a judgment be quantified in order to count as a "money judgment," the Third Circuit relied on inapposite authorities from the bankruptcy context. See *Eaves*, 239 F.3d at 533 (citing *Penn Terra Limited* v. *Department of Environmental Resources*, 733 F.2d 267, 274-75 (CA3 1984)). The Third Circuit's reliance on its narrow interpretation of "money judgment" in *Penn Terra* is especially inapposite because that interpretation was driven by policy concerns that are irrelevant to 28 U.S.C. 1961. In that case, the statute at issue "render[ed] 'enforcement of a money judgment' by a government unit susceptible to the automatic stay." *Penn Terra*, 733 F.2d at 273 (quoting 11 U.S.C. 362(b)(5)). Based on the "general rule that pre-emption is not favored" and the particular language of the statute at issue, the court held that "money judgment" "should be construed *narrowly* so as to leave to the States as much of their police power as a fair reading of the statute allows." *Ibid.* No similar considerations demand a narrow reading of "money judgment" in Section 1961.

[6] This language refers to *pre*judgment interest, but the same rationales apply with even greater force to interest accruing after a judgment. See Kemphaus & Bales, *supra*, at 117.

possession of the fee award from the date of the merits judgment to the date of the exact quantum judgment, the losing party is not harmed by being required to pay interest on the fee award.").[7] Even the Third Circuit itself acknowledges that the majority rule better serves Section 1961's purpose of "compensation of the plaintiff (and the attorney) for the loss of the use of the money." *Eaves*, 239 F.3d at 531-32. The court adopted the minority rule despite these considerations only because it erroneously concluded that it was "dictated by the text" of Section 1961. *Ibid.*

Thus, in this case, between the November 6, 2000 judgment entitling petitioner to recover attorney's fees and the July 29, 2002 judgment quantifying those fees, respondent had the full use of more than $160,000 that was rightfully owed to the petitioner. Respondent was thus able to invest this sum and retain the interest. The Third Circuit's rule therefore gives parties in respondent's position an inappropriate incentive to delay the quantification of fees

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[7] In *Eaves*, the Third Circuit argued that the adverse policy implications of its rule could be mitigated through "delay-in-payment adjustment[s] to the lodestar amount" used to calculate attorney's fees. 239 F.3d at 541. However, such adjustments are impossible when, as in the instant case, Pet. App. 3a-4a, attorney's fees are determined not by the lodestar method but as a fixed percentage of the plaintiff's recovery. Moreover, such ad hoc adjustments are at odds with Section 1961's purpose, which is to provide consistent compensation for delayed payment across all district courts. See S. Rep. No. 97-275, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 11 (referring to a "uniform national rate" and stating that Section 1961's "new interest rate on judgments will apply uniformly to suits between private litigants and suits against the government"). See also Kemphaus & Bales, *supra*, at 132 (stating that *Eaves*'s provision for adjustments to the lodestar method "expressly violates Congress's intent that interest payments under 1961(a) serve as the exclusive form of compensation to prevailing parties for delays in payment of damage awards").

owed "as a means of prolonging its free use of money owed the judgment creditor." *Mathis*, 857 F.2d at 760.

Third, the Third Circuit's rule is inconsistent with this Court's decision in *Kaiser*, which held that a party is not entitled to interest beginning from the date of a judgment later found to be legally insufficient. The issue presented in *Kaiser* was whether a party was entitled to interest dating from a judgment later found to be invalid. This Court held that "[t]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant. Where the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Kaiser*, 494 U.S. at 835-36 (citations and internal quotation marks omitted). In *Kaiser*, the plaintiff was not entitled to interest on a judgment because it created no valid entitlement to the funds. In this case, by contrast, petitioner's entitlement to attorney's fees was created by the November 6, 2000 judgment on the merits – the point when damages were "ascertained" in a "meaningful way." As the Sixth Circuit explained in considering the application of *Kaiser* to this circumstance, "[a]t the time the initial judgment was entered, the district court concluded that, in order to make [Plaintiff] whole, [Defendant] was required to pay [Plaintiff's] reasonable attorney fees. There exists no reason, in either the language or history of § 1961, nor in binding precedent, that prevents this Court from holding that interest accrues on an attorney fee award from the judgment which unconditionally entitles the prevailing party to such fees." *Drabik*, 250 F.3d at 491.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 28, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-2494

MICHAEL L. BERNBACK,
PLAINTIFF-APPELLANT,
v.
THOMAS GRECO, INDIVIDUALLY AND AS PRESIDENT OF HARVEY'S LAKE AMPHITHEATER, INC.,
DEFENDANT-APPELLEE.

Submitted: March 7, 2005
Opinion Filed: March 30, 2005

Appeal from the United States District Court for the Middle District of Pennsylvania. (D.C. Civ. No. 98-00230). Honorable A. Richard Caputo, District Judge.

Before SCIRICA, Chief Judge, and ROTH and GREENBERG, Circuit Judges.

OPINION

GREENBERG, Circuit Judge.

This matter comes on before this court on an appeal from an order entered April 29, 2004, in accordance with a memorandum opinion of the district court of that day. Inasmuch as we are writing only for the parties who, of course, are familiar with this case, we need not set forth its facts or procedural history. The issue in this case is quite simple and is stated fairly by Michael L. Bernback, the appellant: whether interest on an award of attorneys fees and

expenses accrues from the date of the original judgment on a jury verdict entitling a party to attorneys fee and expenses, in this case November 6, 2000, or, as the appellee Thomas Greco argues, from the time when a judgment was entered on the award of attorneys fees and expenses after they were quantified, in this case, July 29, 2002. The district court selected the later date and Bernback has appealed.

The district court exercised diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and we exercise jurisdiction under 28 U.S.C. § 1291. We exercise plenary review as the question is purely of law. *Tudor Dev. Group, Inc. v. United States Fid. & Guar. Co.*, 968 F.2d 357, 359 (3d Cir. 1992).

We will affirm as our result is controlled by our opinion in *Eaves v. County of Cape May*, 239 F.3d 527, 542 (3d Cir. 2001). Bernback's brief, which argues for interest from the earlier date and cites precedent from other courts of appeal in support of this contention, necessarily is of no avail as it is dependent on his assertion that we "wrongly followed the so-called minority view," appellant's br. at 17, in reaching our result in *Eaves*. Of course, we as a panel must reject Bernback's contention as *Eaves* binds us. Third Circuit IOP 9.1.

The order of April 29, 2004, will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL L. BERNBACK, Plaintiff,	:	
VS.	:	CIVIL ACTION NO. 3:98-CV-0230
THOMAS GRECO, Individually and as President of Harvey's Lake Amphitheater, Inc., Defendant.	:	(JUDGE CAPUTO)

MEMORANDUM

This matter presents the interesting question as to whether the prevailing party who has been awarded legal fees is limited to interest on the awarded fees or whether the prevailing party may recover additional attorney fees on the interest accrued and paid on the judgment itself. The issue is presented because in awarding attorney fees in the first instance, I found any fees were capped to the Plaintiff's agreement with his lawyer. The documents authorizing fees to the Plaintiff spoke of collecting from Defendant the actual fees incurred by the Plaintiff. At the same time, Plaintiff's fee agreement with his counsel limited his fees to 40%. The relevant provisions are as follows:

> 2. I (we) agree to pay Angina & Rovner, P.C. any out-of-pocket expenses they incur to secure records, expert etc., plus a contingent fee that is totally dependant upon their obtaining monies for me (us) as follows . . .
>
> (c) Settlement or verdict at trial, or arbitration, after trial, arbitration, or

appeals or shortly before trial, and after this case has been totally prepared – 40%

(d) **If no-fault recovery or non-monetary benefit** – RCA ($500); NJR ($450); others ($400) per hour but **not to exceed 40% of the total recovery** of value of benefit.

(Power of Attorney and Fee Agreement, Doc. 270, Ex. A at ¶ 2(c)(d)) (emphasis added).

By his Motion for Interest, Attorney's Fees and Expenses (Doc. 302), Plaintiff seeks to recover 40% of the interest which was paid on the judgment. In addition, Plaintiff seeks interest on the attorney's fees already awarded, and he seeks the interest from the day I determined the fees were due, not from the day they were quantified.

The interest on the attorney's fees already awarded in the amount of $90,000 began to run on July 29, 2002, the day judgment was entered on the amount of fees. This is governed by *Eaves v. County of Cape May*, 239 F.3d 527 (3d Cir. 2001) where the court held that post judgment interest on an attorney's fee award runs from the date the award is quantified, viz the date there is a "money judgment" under 28 U.S.C. § 1961(a). *Id.* at 527. Therefore, interest on the award of counsel fees and of course the expenses awarded ($162,748.62) begins to run July 29, 2002, the date the judgment for the amount of the fees was entered. The amount of interest owed is therefore $54,935.78.

As noted, Plaintiff also seeks additional fees for services rendered in connection with a post trial appeal to the United States Court of Appeals for the Third Circuit, opposing a petition for a writ of certiorari to the United States Supreme Court, and various other matters requiring the performance of legal services.

In deciding the entitlement and amount of fees on the Plaintiff's original petition for fees and expenses, I did a lodestar analysis, and determined the amount yielded in the lodestar analysis was limited by the agreement which Plaintiff had with his counsel, since the documents providing for fees and costs to the prevailing party authorized "actual attorney's fees incurred, court costs, and other litigation related expenses." (See Memorandum of May 20, 2002 at p. 6.) The fee agreement between the Plaintiff and counsel provided for a contingent fee of 40% in the event of "settlement or verdict at trial . . . or appeals . . . and after the case had been totally prepared." (*Id.* at p. 15.)

Now I am confronted with the Plaintiff's claim for additional fees performed for proceedings post judgment, viz appeal to the United States Court of Appeals for the Third Circuit and petitions for writ of certiorari to the United States Supreme Court. This represents a period of November 9, 2002 to the present. Plaintiffs have not yet provided the number of hours of services provided during this period.

Plaintiff should submit evidence of those services, and I will undertake to determine the amount of fees to which Plaintiff is entitled. After I do a lodestar analysis respecting the additional legal services, I will determine the amount of fees due taking into account the fee agreement.

Therefore, Plaintiff will submit his evidence of fees and expenses for the period since November 20, 2002, together with a brief, within thirty (30) days and the Defendant shall have thirty (30) days to file opposing evidence and a brief.

An appropriate order follows.

Date : April 24, 2004

_____

A. Richard Caputo
United States District Judge

Supreme Court, U.S.
FILED
SEP 3 1 2005
OFFICE OF THE CLERK

No. 05-19

In The

Supreme Court of the United States

MICHAEL L. BERNBACK,

Petitioner,

v.

THOMAS GRECO, Individually and as President of Harvey's Lake Amphitheater, Inc.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should decline to review an unpublished decision of the U.S. Court of Appeals for the Third Circuit affirming the district court's determination of the date from which interest on a judgment for attorney's fees accrues under 28 U.S.C. 1961(a), when, unlike cases from other circuits interpreting sec. 1961(a), the district court's assessment of attorney's fees in this case was based upon private contracts between the parties as well as a complicated fee agreement between petitioner and counsel, and was not otherwise specifically provided for by statute or other provision of law.

CORPORATE DISCLOSURE STATEMENT

Respondent, Thomas Greco, was the sole shareholder of Harvey's Lake Amphitheater, Inc. Through the Stock Purchase Agreement at issue in this case, petitioner acquired "a 50% interest in Harvey's Lake Amphitheater, subject to certain conditions." *Bernback v. Greco*, No. 02-2742, 69 Fed.Appx. 98, 101 (CA3 July 11, 2003). Respondent appears in this matter individually, and as President of Harvey's Lake Amphitheater, Inc.

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COUNTER-STATEMENT OF THE CASE

The underlying facts of this case reflect a complicated business relationship between petitioner and respondent manifested in several agreements between them individually as well as through the entity known as Harvey's Lake Amphitheater, Inc ("HLAI"). Although HLAI was formed in 1992 to construct an outdoor concert arena near the popular Pocono Mountain recreation area of Pennsylvania, the relationship between petitioner and respondent had so deteriorated by 1996 that a series of legal struggles soon commenced. *Bernback v. Greco*, No. 02-2742, 69 Fed.Appx. 98, 101 (CA3 July 11, 2003). The pending petition is merely the most recent salvo in this long and combative process. In fact, this is not the first time this Court has reviewed a petition for writ of certiorari regarding these parties. In 2004, certiorari was denied on respondent's petition seeking review of the Third Circuit's affirmation of the district court's permission to amend petitioner's complaint in the midst of trial, despite the admonitions of Rule 15, Fed.R.Civ.P. *Bernback*, *supra*, *cert. denied*, 540 U.S. 1185 (2004).

Now, it is petitioner who is unhappy with a lower court's determination of an issue important to him, namely, the question of whether interest accrues on an award of attorney's fees from the date of the initial judgment on the merits (which, in this case did *not* include an award of fees), or as the Third Circuit held below, from the "time when a judgment was entered on the award of attorney's fees and expenses after they were quantified . . . " Pet. App. 2a.

The peculiar factual history of this matter is essential to consideration of the question at hand: On November 6,

2000, after the jury's verdict, the district court entered judgment in petitioner's favor, without specific reference to attorney's fees. There was also no indication that attorney's fees were allowable under any particular statutory or other legal provision. Instead, petitioner filed a post-verdict motion for fees and expenses, alleging that two alleged contracts between him and respondent "contained fee shifting provisions that allowed for an award of attorneys' fees . . . " *Bernback*, 69 Fed.Appx. at 105. The district court reviewed these contracts (a Stock Purchase Agreement as well as a Personal Guarantee, *id.*) and concluded that although each contract contained provisions for award of attorney's fees, petitioner had also entered into a separate fee agreement with his counsel which "limited [counsel's] fees to 40%." Pet. App. 3a. For this reason, the district court "conform[ed] the fee award to the fee agreement between [petitioner] and his counsel." *Bernback*, *supra*. The first judgment, therefore, to address attorney's fees was entered on July 29, 2002, after the district court construed the role of these three private agreements in the calculation of those fees. Pet. App. 3a.

When respondent later sought interest on the awarded fees, the district court construed the plain language of 28 U.S.C. 1961(a) (hereinafter sec. 1961), as well as the Third Circuit's decision in *Eaves v. County of Cape May*, 239 F.3d 527 (CA3 2001) and held that interest would be calculated from July 29, 2002, "the day judgment was entered on the amount of fees." Pet. App. 4a. When the Third Circuit affirmed, *id.* at 1a, petitioner sought this Court's review.

REASONS FOR DENYING THE WRIT

A. Since the attorney's fees awarded in this case were based on the district court's interpretation of complicated private contracts and not on statutory or other provisions of law (as in the cases cited by petitioner as representing a "recurring circuit conflict"), the factual complexity of this case makes it an inappropriate vehicle for consideration of the question presented by petitioner.

The attorney's fees at issue in this case were calculated by the district court based upon its interpretation of three separate, complicated and even conflicting agreements between private parties, and were not premised on any statutory or rule-based provisions. The district court found that petitioner and respondent were parties to two of these private agreements (a finding which respondent continues to vigorously oppose), namely the Stock Purchase Agreement and the Personal Guarantee which form the basis for much of the nearly decade long litigation between them. The third contract was a fee agreement between respondent and his counsel, which was based upon a complex calculus of both hourly rates and percentage of recovery. Pet. App. 3a-4a. Without this stew of private contractual provisions, the award of attorney's fees would not have been at issue in this case.

After extraction of the various fee-based clauses of these three documents, and its interpretation of their relevance to one another, the district court constructed its fee assessment and entered judgment awarding the quantified fee on July 29, 2002. Under the plain statutory language of sec. 1961, any interest on this award could only be calculated from this date. *See, Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)

("[T]he starting point for interpretation of [sec. 1961] . . . is the language of the statute itself."). It is this calculation, however, which petitioner seeks to overturn.

Petitioner takes great pains to urge this Court's review of what it perceives to be a "frequently recurring circuit conflict" on the question of when the calculation of interest on a sec. 1961 award begins to run, specifically with regard to attorney's fees. Petition at 2-3. Supporting this contention is a list of decisions from the several courts of appeals addressing the calculation date for interest on such fees. *See, e.g., Associated General Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 484-85 (CA6 2001); *Eaves, supra*; *MidAmerica Federal Savings & Loan Association v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (CA10 1992); *Fleming v. County of Kane*, 898 F.2d 553, 565 (CA7 1990); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995), *cert. denied*, 516 U.S. 1146 (1996); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1052-53 (CA11 1994); *Jenkins v. Missouri*, 931 F.2d 1273, 1277 (CA8 1991); *Mathis v. Spears*, 857 F.2d 749, 760 (CAFC 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 544-45 (CA5 1983). The underlying facts of these cases, however, are vastly different from those in the present case. In fact, in each of the cases cited by petitioner, the award in question was based either on statute or rule which was evident at the time of entry of the award on the merits.

For example, *Drabik*, *Eaves*, *Fleming*, *Friend* and *Jenkins* were civil rights cases under 42 U.S.C. 1983, with the question of attorney's fees governed by 42 U.S.C. 1988. In *BankAtlantic*, the court imposed discovery violation sanctions pursuant to Rule 37, Fed.R.Civ.P. *Mathis* was a patent case, with the fee question arising under 35 U.S.C.

285. *Copper Liquor* involved the Sherman Act, 15 U.S.C. 1, with fees claimed under the Clayton Act, 15 U.S.C. 15. On the other hand, the fee issue in *MidAmerica* arose out of a pendent state claim under the Oklahoma Securities Act. 71 Okla.Stat. 408.

Whatever their decision on the sec. 1961 question, these cases represent the prevailing view regarding award of attorney's fees, namely, that "[u]nder the 'American Rule,' the prevailing party will not be awarded attorney's fees unless expressly authorized by Congress." *King v. JCS Enterprises, Inc.*, 325 F.Supp.2d 162 (E.D.N.Y. 2004). In each of the cases cited by petitioner, either federal or state statute, or procedural rule governed the award of fees. As such, the existence of these provisions which "expressly authorized" the award of attorney's fees was obvious throughout those proceedings.

Such is not the case, however, in the present matter. There is no ancillary statute or rule which "expressly authorized" the award of fees in this case. Instead, the fees in question were contractually based, and required a separate motion for their award as well as a separate adjudication by the district court.

Given the interpretive gymnastics in which the district court had to engage in order to determine what, if any, fee would be awarded, it is an imaginative stretch to say that at the time of the jury verdict and judgment on the merits, it was clear that petitioner was "'unconditionally entitled' to recover attorney's fees." Petition 7-8, fn. 4. As such, the only "judgment" relevant to a sec. 1961 interest calculation under the peculiar facts of this case was the July 29, 2002 date. By upholding the district court, the Third Circuit merely recognized that "[i]n the

realm of fee awards . . . to a far greater extent than is true of discrete legal issues, the battle is likely to be determined in the trial court . . . " *U.S. v. Metropolitan Dist. Com'n,* 847 F.2d 12 (CA1 1988) (internal citations omitted).[1]

While petitioner suggests that grant of certiorari is necessary in this case in order to resolve this supposed "circuit conflict," he is mistaken. In fact, this case is a most inappropriate vehicle for resolution of the question petitioner presents given the complex factual marsh through which the Court must wade in order to reach that question. Actually, this Court would have to dive into the district court's fact-based assessment of the contracts at issue and the intent of the various parties to those contracts and then determine what impact these factual nuances have on the assessment of sec. 1961 issues in other cases where a clearer underlying entitlement to attorney's fees existed. Such machinations do not readily allow for the kind of clear resolution petitioner seeks, nor do they easily support invocation of certiorari. As such, for these reasons this Court should deny certiorari.

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[1] Petitioner is in error when he suggests that the Third Circuit only grudgingly affirmed. *See,* Petition at 2, ¶ 3. His claim that the Third Circuit "acknowledged that petitioner's position was supported 'by precedent from other courts of appeals,'" is an overstatement. *Id.* The Third Circuit merely noted that petitioner had *cited* these other cases, but did not give any indication that it agreed with petitioner as to their value. Instead, the panel restated its allegiance to the precedent from this Circuit outlined in *Eaves.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 15 2005
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No. 05-19

IN THE

Supreme Court of the United States

Michael L. Bernback,

Petitioner,

v.

Thomas Greco, Individually and as President of Harvey's Lake Amphitheater, Inc.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In his brief in opposition, respondent notably does not dispute the petition for certiorari's showing that the question presented merits this Court's review. He does not dispute that the courts of appeals are squarely divided over whether interest on an award of attorney's fees accrues from the entry of the judgment establishing the *right* to fees (the holding of six circuits) or, alternatively, from the entry of a later order fixing the *amount* of fees (the holding of three circuits, including the Third Circuit here). See Pet. 2-3. Nor does he doubt that the conflict among the courts of appeals is longstanding and intractable, or that the question is important. See *id.* 3-6. Indeed, respondent does not even dispute that the minority rule adopted by the Third Circuit is wrong on the merits. As the petition demonstrated, both the text and purpose of Section 1961 support the majority rule. See *id.* 8. This Court's intervention is plainly warranted, given that the issue arises in almost every case in which attorney's fees are awarded, has a significant financial consequence to those cases, and generates substantial and unnecessary litigation. Only this Court can bring uniformity to federal law on this recurring question.

Respondent's only argument against review is that this case is supposedly a bad vehicle to decide the question presented. In fact, this is an ideal vehicle: the question was the only issue decided below, and neither of the lower courts doubted for a moment that it was squarely presented here. Respondent claims that, contrary to the understanding of the lower courts, petitioner would not prevail even under the majority rule because – according to respondent – petitioner's right to the attorney's fees was in doubt at the time that the district court entered a judgment in petitioner's favor in the amount of $225,000 on a jury verdict. Because respondent's lone argument against certiorari mischaracterizes not only the majority rule under which petitioner would prevail, but also the facts of this case, certiorari should be granted.

1. Respondent contends that this case is an "inappropriate vehicle for consideration of the question presented," BIO 3, because petitioner's right to an award of attorney's fees was not recognized at the time of the jury verdict itself, but instead was announced when the district court granted petitioner's motion for fees. See *id.* 3, 5. However, as petitioner has previously explained, see Pet. 7 n.4, the majority rule is that interest begins to accrue with a judgment that "unconditionally entitle[s]" a party to recover fees, regardless whether that judgment actually mentions attorney's fees. Interest runs from the date the right to attorney's fees *arises*, as opposed to the date that an entitlement to attorney's fees is *announced*. See, *e.g.*, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 250 F.3d 482, 494 (CA6 2001) ("[A]n analysis of the language of § 1961(a) leads to the conclusion that a 'money judgment' is the judgment that unconditionally entitles the prevailing party to reasonable attorney fees."); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544 (CA5 1983) (en banc) ("The relevant judgment for purposes of determining when interest begins to run is the judgment establishing the right to fees or costs, as the case may be."), overruled on other grounds by *Int'l Woodworkers of America* v. *Champion International Corp.*, 790 F.2d 1174, 1175-76 (1986) (en banc). That rule is moreover perfectly appropriate and sensible: the date on which the judgment is entered marks the point at which the right to attorney's fees arises; from that date forward, until the losing party pays the fees, he has the benefit of the funds and should pay interest until the date on which he finally pays the fees.

In this case, there can be no serious dispute that petitioner's right to attorney's fees was established with the jury verdict in his favor – a jury verdict that respondent has already unsuccessfully appealed, see *Bernback* v. *Greco*, 69 Fed. Appx. 98, 105 (CA3 July 11, 2003), cert. denied, 540 U.S. 1185 (2004). The relevant question is whether some other event had to occur before the entitlement arose, and the

answer to that question is incontestably "no." The question is not whether, by happenstance, the district judge only later considered the question and announced the conclusion that attorney's fees were owed.

In this case, the contract between petitioner and respondent expressly provided that "if any action at law or equity is brought to enforce or interpret this Agreement, the prevailing party therein shall be entitled to recover from the other party the actual attorney's fees incurred, court costs, and other litigation-related expenses," see 69 Fed. Appx. at 105; a second contract between petitioner and respondent "provided for attorney's fees and costs in almost identical language," *ibid.* Hence, the jury verdict unquestionably established petitioner's right to attorney's fees, which under the majority rule in the circuits triggered his right to interest from that date forward.[1] The lower courts accordingly were right to regard petitioner's entitlement to attorney's fees as a result of the jury verdict in his favor as settled, and this Court would have no reason to revisit that question. See Pet. App. 1a-2a (describing issue as "whether interest on an award of attorneys fees and expenses accrues from the date of the original judgment on a jury verdict entitling a party to attorneys fee[s] and expenses"); *id.* 4a (noting that petitioner "seeks * * * interest from the day I determined the fees were due").

But in any event, and as petitioner has already explained, see Pet. 7 n.4, if the Court believed that some question about petitioner's entitlement to the fees nonetheless remained, such

---

[1] Despite the clear language of the contracts, respondent attempts to cloud the issue by invoking a third fee provision: a separate agreement between petitioner and his counsel "providing that [petitioner's] attorney's fees are limited to 40% of the jury verdict," see 69 Fed. Appx. at 105. However, as is plain on its face, that separate agreement addressed only the *amount* of fees that petitioner's counsel would receive, and had no effect whatsoever on petitioner's *right* to receive fees.

a question could appropriately be resolved by the court of appeals on remand from this Court.

2. The fact that respondent may have disputed whether he was a party to the two contracts creating petitioner's right to attorney's fees and thus whether petitioner was a "prevailing party" entitled to fees, see BIO 3, is similarly irrelevant to the determination whether the jury verdict was a judgment that "unconditionally entitled" petitioner to attorney's fees. Even in cases involving awards of attorney's fees expressly provided for by statute, courts must after the entry of the initial money judgment determine whether the party seeking such fees is in fact a "prevailing party" and, if so, the extent to which that party is entitled to receive fees. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992) ("A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."). Such determinations frequently require the court to engage in a complicated analysis of multiple claims. See, *e.g.*, *Koswenda* v. *Flossmoor Sch. Dist. No. 161*, 227 F. Supp. 2d 979, 994 (N.D. Ill. 2002) (concluding that plaintiff in administrative proceeding brought under the Individuals With Disabilities Education Act was "prevailing party" when he "received partial recovery on nine of twenty-one issues and items of requested relief, but not on [his] major claims," but reducing attorney's fees award in light of plaintiff's limited success). However, once a party is determined to be a "prevailing party" for purposes of entitlement to reasonable attorney's fees, that status runs from the date of the judgment in his favor, as it is that judgment – rather than the court's determination that he is indeed a prevailing party – which establishes his right to receive attorney's fees. See *supra* at 2; see also, *e.g.*, *Drabik*, 250 F.3d at 493 ("[S]ince the district court's judgment has been upheld on appeal, [appellant] has been, since entry of judgment on the merits, entitled to its reasonable attorney fees.").

3. To the extent that respondent is somehow arguing that, for purposes of Section 1961(a), an unconditional entitlement to attorney's fees can arise only from a statute or a rule, he is equally mistaken. To the contrary, nothing in the statute supports such an argument. See 28 U.S.C. 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of the entry of the judgment * * *."). Respondent's assertion is accordingly belied by the opinions of the courts confronting the question presented. See, *e.g.*, *Drabik*, 250 F.3d at 485 ("We now turn to the following issue: Whether an award of attorney fees accrues interest, pursuant to 28 U.S.C. § 1961, from the date of the judgment that unconditionally entitles the prevailing party to reasonable attorney fees, or the date of the judgment quantifying that fee award."); *Friend* v. *Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995) ("Interest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set."), cert. denied, 516 U.S. 1146 (1996); *Mathis* v. *Spears*, 857 F.2d 749, 760 (CAFC 1988) ("Interest on an attorney fee award * * * runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

Because this question presented easily satisfies all of the criteria for granting certiorari, and because this case presents an ideal vehicle for resolving that question, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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